Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS D4–22A–216 OF 2007 AND D4–22A–227 OF 2007
ROHANA YUSUF J
22 SEPTEMBER 2010

Civil Procedure — Judge — Application to recuse judge — Judge formerly employed by BNM — Whether there was real danger of apparent bias in judge hearing present suit — Whether judge who had seen statement of claim of similar suit should recuse herself from present suit — Whether judge's observations made in course of hearing were based on information obtained during her course of employment with BNM

The plaintiff's claim against the defendant was consolidated and heard together with another suit, which was a claim by the defendant against the plaintiff in respect of the same banking facility. After the case had proceeded for trial and after two of the plaintiff's witnesses had completed their testimonies, the plaintiff made the present application under O 92 of the Rules of the High Court 1980 to recuse the judge from further hearing the trial of this case on the basis of the judge's alleged involvement with this case while she was serving as a Deputy Director at the Jabatan Perbankan Islam dan Takaful ('JPIT'), Bank Negara Malaysia ('BNM'). This recusal application was premised on two grounds, namely, that the judge had seen a writ of summons and statement of claim of another suit ('the Labuan suit'), which was similar to the present case; and that the observations made by the judge in allowing the O 14 application in the consolidated suit were indicative of the fact that she had prior knowledge of the facts and issue in her capacity as a regulator in BNM. The plaintiff argued that as the judge was privy to the letters of communication between BNM and the defendant in respect of the plaintiff's account with the defendant bank, this meant that there was a real likelihood of apparent bias for the judge to continue to hear this case. The plaintiff submitted that as the judge was aware of the facts of the present case she may unfairly regard the case of the plaintiff with disfavour. The defendant submitted that although the judge was privy to the communications to BNM, she was not the sole decision making power over this matter at the BNM. The defendant also submitted that it was not BNM's policy to interfere in legal suits involving banks and that it only remained as a reporting centre. In any case the defendant bank argued that since plaintiff had also sent a letter to BNM urging an investigation to be conducted against the defendant bank, BNM had both versions of the case, ie the defendant's as well as the plaintiff's. The defendant further contended that this application by the

plaintiff was a tactical move to delay trial and thus an abuse of the court process since it was made five days after trial had commenced.

Held, dismissing the plaintiff's application with no order as to costs:

(1) As evidenced from the series of communications between the defendant bank and BNM, the latter did not get involved in a legal suit involving banks. Further, the letter sent to BNM enclosing a copy of the writ of summons and statement of claim for the Labuan suit, which was the basis of the plaintiff's claim, were public documents accessible to anyone. The statement of claim in the Labuan suit disclosed only the plaintiff's case against the defendant bank and not the other way around. In any case the Labuan suit was widely reported in the newspapers and was known to all reading members of the public and the judge would have had knowledge of the Labuan suit like any other reading member of the public. In addition, if having access to the writ of summons and statement of claim merited a recusal then nearly all judges in the Kuala Lumpur Court Complex would need to recuse themselves all the time since files change hands every day especially with the introduction of the tracking system and mediation. That certainly could not be the legal reason for a judge to be recused on the basis that there was a danger of real apparent bias. Thus in the present case there was no such danger of real apparent bias and it would be a dereliction of the judge's duty if she were to recuse on such flimsy grounds. It was improper for a judge to abdicate from his duty by disqualifying himself with no real basis (see paras 15-16, 18 & 24–25).

(2) The plaintiff's application of the unreported decision in *Dato' Seri Ir Hj Mohamad Nizar v Dato' Dr Zambri bin Abdul Kadir* No R3–25–25 of 2009 to the present application was totally misplaced. This was because although the judge was under BNM's employment, BNM was neither a party in this proceeding nor had any interest in this suit. The judge's involvement was indirect, minimal and too remote. It was emphasised that BNM is a neutral party, with powers granted under the law to oversee banking operations in this country (see paras 20–21).

(3) As the judge's observations made in the course of hearing were based on common sense, there was no merit in the plaintiff's argument that these observations were based on information obtained during the judge's course of employment with BNM. A judge was allowed to make general and common sense observations since the law was about what makes sense. A judge's role was to demystify the law for the public and thus was not to be denied the benefit of making a simple analogy to drive a point made or for an understanding of some complicated legal principle (see para 22).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan digabungkan dan didengar bersama dengan tindakan lain, yang mana adalah tuntutan oleh defendan terhadap plaintif berkaitan kemudahan perbankan yang sama. Selepas kes tersebut diteruskan untuk perbicaraan dan selepas dua saksi plaintif telah selesai memberi keterangan, plaintif membuat permohonan ini di bawah A 92 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk hakim tersebut menarik diri daripada mendengar selanjutnya perbicaraan kes ini atas asas penglibatan hakim dengan kes ini semasa beliau berkhidmat sebagai Timbalan Pengarah di Jabatan Perbankan Islam dan Takaful ('JPIT'), Bank Negara Malaysia ('BNM'). Permohonan untuk penarikan diri ini adalah berdasarkan atas dua alasan, iaitu, bahawa hakim telah melihat writ saman dan penyata tuntutan tindakan satu lagi ('tindakan Labuan') yang mana adalah sama dengan kes ini; dan bahawa pemerhatian yangdibuat oleh hakim tersebut dalam membenarkan permohonan A 14 di dalam tindakan yang digabungkan adalah menunjukkan fakta bahawa beliau mempunyai pengetahuan fakta sebelumnya dan isu dalam kapasitinya sebagai pengatur di BNM. Plaintif berhujah bahawa hakim adalah privi kepada surat-surat komunikasi di antara BNM dan defendan berkaitan akaun plaintif dengan defendan, ini bermaksud bahawa kemungkinan terdapat berat sebelah yang jelas untuk hakim meneruskan untuk mendengar kes ini. Plaintif berhujah bahawa memandangkan hakim mengetahui fakta kes ini beliau mungkin tidak memberikan perhatian yang adil terhadap kes plaintif dengan tidak memihaknya. Defendan berhujah bahawa walaupun hakim adalah privi kepada komunikasi BNM, beliau bukan satu-satu berkuasa membuat keputusan atas perkara ini di BNM. Defendan juga berhujah bahawa ia bukan polisi BNM untuk campur tangan dengan tindakan-tindakan undang-undang melibatkan bank-bank dan bahawa ia hanya kekal sebagai pusat pelaporan. Walau bagaimanapun defendan berhujah bahawa memandangkan plaintif juga menghantar surat kepada BNM mendesak siasatan dilakukan terhadap defendan, BNM mengetahui kedua-dua versi kes tersebut, iaitu kes defendan dan juga kes plaintif. Defendan selanjutnya berhujah bahawa permohonan ini oleh plaintif adalah langkah taktikal untuk melambatkan perbicaraan dan oleh itu salah guna proses mahkamah memandangkan ia dibuat lima hari selepas perbicaraan bermula.

Diputuskan, menolak permohonan plaintif tanpa perintah kepada kos:

(1) Seperti yang terbukti daripada komunikasi berturut-turut di antara defendan dan BNM, BNM tidak terlibat dalam tindakan undang-undang melibatkan bank-bank. Selanjutnya, surat dihantar ke BNM melampirkan salinan writ saman dan penyata tuntutan untuk tindakan Labuan, yang mana adalah asas tuntutan plaintif, adalah dokumen-dokumen awam yang boleh diperolehi oleh sesiapapun. Penyata tuntutan dalam tindakan Labuan mendedahkan hanya kes

plaintif terhadap defendan dan bukan sebaliknya. Walau bagaimanapun tindakan Labuan dilaporkan secara luas di dalam suratkhabar-suratkhabar dan diketahui oleh kesemua pembaca awam dan hakim mungkin mempunyai pengetahuan mengenai tindakan Labuan seperti mana-mana pembaca awam yang lain. Selanjutnya, jika dengan mempunyai akses kepada writ saman dan penyata tuntutan mewajarkan penarikan diri dengan itu hampir kesemua hakim di Kompleks Mahkamah Kuala Lumpur perlu menarik diri mereka sendiri pada kesemua masa memandangkan fail-fail bertukar tangan setiap hari terutamanya dengan pengenalan sistem menjejak dan pengantaraan. Ini semestinya tidak dapat menjadi alasan undang-undang untuk hakim dikehendaki menarik diri atas asas bahawa terdapat bahaya berat sebelah yang jelas. Oleh itu, dalam kes ini tidak terdapat bahaya berat sebelah yang jelas sedemikian dan ia akan menjadi satu peninggalan tugas hakim jika beliau dikehendaki menarik diri atas alasan-alasan yang tidak kukuh sedemikian. Ia adalah tidak betul untuk hakim melepaskan daripada tugasnya dengan tidak melayakkan dirinya tanpa asas yang jelas (lihat perenggan 15-16, 18 & 24–25).

(2) Penggunaan keputusan yang tidak dilaporkan oleh plaintif dalam kes *Dato' Seri Haji Mohd Nizar and Dato' Dr Zambri bin Abdul Kadir* No R3–25–25 Tahun 2009 kepada permohonan ini adalah disalahletakkan keseluruhannya. Ini adalah kerana walaupun hakim di bawah perkhidmatan BNM, BNM bukan pihak dalam prosiding ini dan tidak mempunyai apa-apa kepentingan dalam tindakan ini. Penglibatan hakim adalah secara tidak langsung, minima dan terlalu sedikit. Adalah ditekankan bahawa BNM merupakan pihak yang tidak menyebelahi mana-mana pihak, dengan kuasa yang diberikan di bawah undang-undang untuk mengawal operasi perbankan di negara ini (lihat perenggan 20–21).

(3) Memandangkan pemerhatian-pemerhatian hakim adalah berdasarkan atas akal fikiran, tidak terdapat merit di dalam penghujahan plaintif bahawa pemerhatian-pemerhatian ini adalah berdasarkan maklumat yang diperolehi semasa perkhidmatan hakim tersebut di BNM. Seorang hakim dibenarkan untuk membuat pemerhatian-pemerhatian am dan berasas memandangkan undang-undang adalah mengenai apa yang dapat difahami. Peranan hakim adalah untuk mendedahkan undang-undang kepada orang awam dan oleh itu tidak boleh dinafikan faedah untuk membuat analogi ringkas untuk menunjukkan poin yang dibuat atau untuk pemahaman prinsip undang-undang yang terlalu rumit (lihat perenggan 22).]

Notes

For cases on application to recuse judge, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4139–4148.

Cases referred to

Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors [2008] 5 MLJ 206; [2008] 3 CLJ 653, CA (refd)

Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors [2008] 5 MLJ 206; [2008] 3 CLJ 653

Committee for Justice and Liberty v Canada (National Energy Board) [1978] 1 SCR 369

Dato' Seri Ir Hj Mohamad Nizar v Dato' Dr Zambri bin Abdul Kadir No R3-25-25 of 2009 (unreported) (not folld)

Dato' Seri Ir Hj Mohamad Nizar v Dato' Dr Zambri bin Abdul Kadir No R3–25–25 of 2009

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

King, The v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, DC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65

R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577, HL (refd)

R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577

R v Gough [1993] 2 All ER 724

R v Gough [1993] 2 All ER 724, HL (refd)

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2009] 6 MLJ 416; [2010] 4 CLJ 388

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd [2009] 6 MLJ 416; [2010] 4 CLJ 388, HC (refd)

The King v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256

Utama Merchant Bank Bhd v Dato' Mohd Nadzmi Mohd Salleh [2009] 6 CLJ 371, HC (refd)

Utama Merchant Bank Bhd v Dato' Mohd Nadzmi Mohd Salleh [2009] 6 CLJ 371

Legislation referred to

Rules of the High Court 1980 O 14, O 92

Malik Imtiaz Sarwar (Mathew Thomas Phillip and Asma bt Yunus with him) (Thomas Philips) for the plaintiff.

Tommy Thomas (Allan Gomez and Ganesan Nethi with him) (Tommy Thomas) for the defendant.

Rohana Yusuf J:

[1] Enclosure 45 is an application by the plaintiff, Tan Sri Abdul Khalid bin Ibrahim ('TSKI') in Suit No D4–22A–216 of 2007, to recuse me from further hearing the trial of this case, which involves his claim against Bank Islam Malaysia Bhd ('BIMB'). The case is consolidated and heard together with Suit No D4–22A–227 of 2007, which is the claim by BIMB against him, in the same transaction relating to a banking facility.

[2] This application, made under O 92 of the Rules of the High Court 1980, is grounded on the basis of my alleged involvement in the case while I was serving as a deputy director at the Jabatan Perbankan Islam dan Takaful ('JPIT'), Bank Negara Malaysia. It is premised on two grounds, namely:

GROUND ONE

[3] There was a letter which refers to a conversation between Encik Fazlur Rahman bin Ebrahim, the then chief executive officer of BIMB, and I, enclosing an unsealed copy of a writ of summons filed by TSKI against BIMB and PNB in Labuan ('Labuan suit') and,

GROUND TWO

[4] In allowing the O 14 application by BIMB against TSKI in Suit No D4–22A–227 of 2007 heard together with the present suit, I had made the following observations, in my written ground of judgment reported in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2009] 6 MLJ 416; [2010] 4 CLJ 388. These observations according to the plaintiff are said to be illustrative of my prior appraisal of the facts and issue in my capacity as a regulator in Bank Negara Malaysia then. Quoting the written submissions of Encik Malik Imtiaz Sarwar (Encik Mathew Thomas Phillip and Puan Asma bt Yunus with him) learned counsel for TSKI, the said observations are as enumerated herein below:

> 15.1The Learned Judge's concluded that the plaintiff's claim as to the existence of a collateral contract between the plaintiff and the defendant was highly improbable based on the conclusion that the plaintiff was an 'experienced and astute businessman' and it would be preposterous to expect the plaintiff to rely on oral promises which contradicted the written agreement signed. This was a conclusion of fact as to the plaintiff's abilities and state of mind despite there being no factual foundation for the same.
>
> 15.2The Learned Judge dismissed an issue raised by the plaintiff as to alleged impropriety on the part of CIMB Investment Berhad ('CIMB'), acting together

with the defendant, in disposing/selling of the plaintiff's pledged KGB ('Kumpulan Guthrie Berhad'). The learned Judge's basis was that CIMB was a reputable financial institution regulated by Bank Negara and the Securities commission. This conclusion avoided the factual issues raised and referred rather to a regulatory framework that the learned Judge was once apart of;

15.3The Learned Judge drew an analogy between the plaintiff's raising of the issue of illegality despite his having entered the A-Bai Bithaman Ajil Facility agreement and having purportedly benefited from the same, with a Muslim refusing to pay for his meal in a restaurant after having eaten the meal, when told after inquiring, that the food was non-halal. This remark was of a very personal nature and in the context of the matters set out above suggests a prior impression of the plaintiff and the positions he has taken in the actions herein.

[5] The following three facts must at the outset be noted viz:

(a) That, the Labuan suit was withdrawn and the present suit is based on the same subject matter as in the Labuan suit.

(b) I had also informed parties that at the relevant time I was one of the three Deputy Directors of JPIT, at Bank Negara Malaysia.

(c) The trial of this case had since commenced for five days and two witnesses for TSKI completed their testimonies.

[6] On the first ground, learned counsel for TSKI, Encik Malik Imtiaz Sarwar argued that the sequence of the following letters of communication sent to the Bank Negara Malaysia would have made me appraised myself with the present case and this would lead to real danger of apparent bias on my part in hearing this case. The said letters of communication are as below:

(a) a letter from BIMB dated 5 August 2004 sent to Bank Negara Malaysia for the attention of Encik Mohammad Khairuddin Hj Arshad of JPIT seeking clarification on some audit matter and the necessity for additional provisioning relating to TSKI's account with BIMB (exh AKI1);

(b) a Bank Negara Malaysia's letter dated 10 August 2004 responding to the defendant allowing deferment of provisioning relating to the account of TSKI sent by Pengarah Jabatan Penyeliaan Perbankan Bank 1, Encik Azizan bin Abdul Rahman (in AKI1);

(c) a letter dated 8 July 2005 from TSKI to the Governor of Bank Negara Malaysia then and now Tan Sri Zeti Akhtar Aziz, requesting investigation into the alleged malpractices of Bank Islam (Labuan) Bhd and seeking appointment with her (exh AKI5);

(d) a letter dated 13 July 2005 sent to Bank Negara Malaysia for the attention of Puan Faridah Saeron of JPIT, from Encik Fazlur Rahman bin Ebrahim

informing Bank Negara Malaysia of the claim by TSKI in the Labuan suit with an undertaking to provide further update upon service of summons by TSKI (in exh AKI3);

(e) a letter dated 22 July 2005 sent to Bank Negara Malaysia for my attention by Encik Fazlur Rahman bin Ebrahim, referring to tele-conversation and enclosing an unsealed copy of the writ of summons and statement of claim of the Labuan suit (exh AKI4).

THE PLAINTIFF'S CASE

[7] Encik Malik Imtiaz Sarwar contended that, based on the above letters of communications taken as a whole, there is a real danger of apparent bias in the sense explained in *R v Gough* [1993] 2 All ER 724, followed by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65, on my part to continue to hear the case. It is his submission that, looking at these communications as a whole I would have been appraised with the facts of the present case and I may unfairly regard the case of the plaintiff with disfavour. This is because according to him, I would have formed some impressions on some material aspects of the case since information was indeed furnished to Bank Negara Malaysia on the Labuan suit. He contended that there is therefore a real likelihood of apparent bias.

[8] Encik Malik Imtiaz Sarwar also contended that such involvement is demonstrated and illustrated through my observations in my grounds of judgment in the application for O 14 by BIMB.

[9] Encik Malik Imtiaz Sarwar further drew my attention to the Judges Code of Ethics, in particular cl 5 and cl 8 thereof.

THE DEFENCE'S ARGUMENT

[10] Learned counsel for BIMB, Encik Tommy Thomas (Encik Allan Gomez with him) first argued that the communication to Bank Negara Malaysia in the letters exhibited involved four different officers of the Bank Negara Malaysia. He contended that I was not the sole power making decision and in fact had no sole control over this matter at the Central Bank then. Encik Tommy Thomas explained that in a situation like this, Bank Negara Malaysia will do nothing and least of all, interfere in a legal suit involving banks. Bank Negara Malaysia does not play any role but remain as a reporting centre, as disclosed from the silent responses to the correspondences relating to the Labuan suit. In fact according to Encik Tommy Thomas the Bank Negara

Malaysia did nothing more than keeping itself informed in view of the newspaper report which widely covered the Labuan suit at that time.

[11] Encik Tommy Thomas urged this court to note that even if the Bank Negara Malaysia received information from the defendant, Bank Negara Malaysia also received information on the matter from the plaintiff at the same time as shown in exh AKI5. Exhibit AKI5 is a letter written by TSKI to the Governor of Bank Negara Malaysia urging action or investigation be conducted against the defendant. The fact that TSKI had also sent a letter to the governor provides Bank Negara Malaysia with both versions of the case, namely BIMB's as well as TSKI's.

[12] Encik Tommy Thomas however submitted that a more pertinent point to be noted is the timing of this application. First, it is to be noted that, in relation to my observations in my grounds of judgment for the O 14 application, these observations had been available to the plaintiff at all the material time. When the appeal court, having overruled that decision, sent the case back to the High Court for a full trial, why was there was no request by the plaintiff to go before another judge to hear the case? Secondly, the plaintiff decided to raise this issue only after the case had proceeded for trial and after two of the plaintiff's witnesses has completed their testimonies. Exhibit AKI4 and all the other letters of communications to Bank Negara Malaysia were also available at the case management stage. There are 18 volumes of the trial bundle prepared, and they were served on the plaintiff's solicitor on 3 April 2010. These letters are and were at all times available in the said bundles prepared for trial. Hence, the defendant, as deposed in an affidavit by its senior manager, alleges that TSKI in making the present application is doing so for a collateral purpose and as a tactical manoeuvre, simply to delay the trial, just like the earlier application to disqualify learned counsel for BIMB, Encik Tommy Thomas. Accordingly the defendant says this application is an abuse of the court process since it was made after trial had commenced and upon hearing the testimonies of two witnesses of the plaintiff for a period of five days. This tactic to delay will involve a substantial costs and a waste of judicial time.

FINDINGS

[13] Let me first deal with the first ground of this application. In the upshot my apparent involvement relates to AKI4, which is reproduced below for convenience:

BY HAND/URGENT

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Bank Islam
Progressive, Professional & Friendly

Tarikh: 22 Julai, 2005/15 Jamadilakhir, 1426 H

Pengarah
Bahagian Perbankan Islam dan Takaful
Tingkat 6, Blok B Jalan Dato' Onn
PO Box 10922
50480 Kuala Lumpur

(u/p: Pn. Rohana binti Yusof)
Assalamu'alaikum,

TAN SRI DATO' ABDUL KHALID BIN IBRAHIM lwn PNB DAN BANK ISLAM MALAYSIA BERHAD

Perkara tersebut di atas dan percakapan telefon di antara Pn. Rohana binti Yusof di pihak tuan dan En. Fazlur Rahman Ebrahim di pihak kami pada pagi ini adalah di rujuk.

Bersama-sama ini dilampirkan satu salinan Writ Saman yang belum dimaterai bagi kes di atas untuk tindakan lanjut pihak tuan.

Sukacita pihak tuan akui penerimaan dengan menandatangani pendua surat ini dan dikembalikan.

Sekian, terima kasih.

b/p **BANK ISLAM MALAYSIA BERHAD**
(FAZLUR RAHMAN EBRAHIM)
Ketua Pegawai Operasi

[14] In his affidavit the signatory of the above letter, Encik Fazlur Rahman bin Ebrahim explained the context of the above letter. He said, he first sent AKI3 for the attention of Puan Faridah Saeron. In that letter BIMB had informed Bank Negara Malaysia about the Labuan suit but could not provide detailed of the same. He gave an undertaking to update Bank Negara Malaysia upon receipt of the summons. BIMB also informed that it had appointed solicitors for the impending suit. When BIMB received an unsealed copy of writ of summons and statement of claim he wrote AKI4 as per his earlier

undertaking. He cannot explicitly recall the conversation with me as referred to in the letter, since it took place some five years ago. However he believes that in all likelihood it would be a follow up of the letter in AKI3 to inform Bank Negara Malaysia that BIMB had been served with an unsealed copy of writ of summons and statement of claim for the Labuan suit.

[15] Essentially, all the communications relate on the transaction involving BIMB and TSKI as listed above are centred on two main issues. One, regarding the need for further provisioning by BIMB relating to the account of TSKI, and the other simply to inform Bank Negara Malaysia of the then Labuan suit. As evidenced from the series of communication in para 6 above, it is plain and obvious that the assertion by Encik Tommy Thomas that, Bank Negara Malaysia does and did not get involved in a legal suit involving banks, is indeed true. Despite the letters sent informing Bank Negara Malaysia about the Labuan suit, there is absolutely no response or comment from Bank Negara Malaysia on it. The only matter of concern for Bank Negara Malaysia appears to be the provisioning issue. In AKI1, Bank Negara Malaysia approved deferment of the provisioning requirement. It is also true that the communications were made to different officers of Bank Negara Malaysia and not all were sent to me.

[16] In respect of the letter which was sent to Bank Negara Malaysia for my attention in exh AKI4, it is clear that it was a follow up of the earlier letter where BIMB undertook to inform Bank Negara Malaysia, once the summons was served. It is a cover letter enclosing the unsealed copy of a writ of summons and statement of claim for the Labuan suit. Like all writ of summons and statement of claim, they are public documents, accessible to anyone and they disclose the basis of the plaintiff's claims. A statement of claim as the name suggests, is a statement of alleged facts by the plaintiff's against the defendant. It discloses nothing more than that. In the statement of claim for the Labuan suit, it discloses only TSKI's case against BIMB and not the other way round. As stated in the affidavit of TSKI himself, the Labuan suit was widely reported in the newspapers and was known to all reading members of the public. For that reason I cannot see how I could have appraised myself with the present case which would lead to real danger of apparent bias on my part in hearing this case simply because, like any other reading members of the public, I would have knowledge of the Labuan suit. If some evidence were adduced to show that material information which may affect the course of this trial, other than facts which are within public knowledge, were within my personal knowledge and had been or there is a likelihood of it being imported into this proceedings, then perhaps I may agree that there may be real apparent bias on my part to hear this case. In respect of the Labuan suit, I would know no more than what appeared in the unsealed writ of summons and statement of claim.

[17] A fortiori, a trial is conducted in court where evidence are adduced before the judge, based on the statement of claim. Without hearing evidence, no impression and what more decision can be made. Thus to put it simply, the question that beckons to be asked is, whether it is the position of the law that a judge who had seen a statement of claim, albeit a suit not too dissimilar from the one before him, will pose a real danger of bias and should not proceed to hear the case?

[18] If merely having access to the writ of summons and statement of claim merits a recusal, then in the Kuala Lumpur Court Complex nearly all judges would have to recuse themselves all the time, since court files change hand everyday especially with the introduction of tracking system and mediation. That certainly cannot be the legal reason or a ground to apply for a judge to be recused on the basis that there is a danger of real apparent bias as shown in the decision of *Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 5 MLJ 206; [2008] 3 CLJ 653 and *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293. There is simply no such danger of real apparent bias in the present circumstances. In that same light, in the modern mode of trial a judge would be appraised of the statement of claim when he proceeds to do case management of the case. In the course of which the judge would in fact be posing question to counsel on the facts, issues and documents required in a trial. As compared, a judge conducting a case management would be even more involved in a case than I would had been, by merely looking at an unsealed writ and a statement of claim of not even the same case, but of a suit which is said to be similar to the case I am now trying.

[19] Encik Malik Imtiaz Sarwar also drew my attention and contended that the situation here is parallel to the case involving the dispute on the rightful Menteri Besar of Perak in the unreported decision in *Dato' Seri Ir Hj Mohamad Nizar v Dato' Dr Zambri bin Abdul Kadir* No R3–25–25 of2009. In that case the learned judge Mohamad Ariff Md Yusof J recused himself from presiding due to his past involvement in the same political party as that of the plaintiff therein. His Lordship disclosed that he was at one time, the legal advisor and a counsel for Parti Islam Se-Malaysia ('PAS'); he had been a member of PAS with party position at branch and state levels and in fact had contested in the 2004 general election as a PAS candidate. The litigant in that case Dato' Seri Ir Hj Mohamad Nizar is a PAS state assemblyman on a PAS ticket who was subsequently appointed the Menteri Besar of Perak. In view of his past involvement in PAS His Lordship recused himself to avoid any appearance of bias.

[20] In my view, the applicant comparison of that case to the present application is totally misplaced. First and foremost, Bank Negara Malaysia is not a party in this proceeding and nor does it have any interest in this suit. My

allegiance to Bank Negara Malaysia, when I was under its employment therefore has no bearing on this case. Today, I dare say that I remain true to my calling as judge. As a matter of comparison with the above Menteri Besar Perak case, my alleged involvement in the present case was that I was shown the unsealed of a writ and statement of claim by TSKI against the defendant and Perbadanan Nasional Bhd ('PNB') for a suit that I cannot now recall whether it is similar to the present suit or otherwise. It is indirect, minimal and too remote. It would be highly speculative to infer my knowledge in relation to all other communications with any other officers of Bank Negara Malaysia in the matter. In any event, looking at the neutral position of Bank Negara Malaysia in the matter I do not see any appearance of bias, or even less, any real danger of bias. Bank Negara Malaysia clearly would have no interest in the outcome of this proceeding. I have no involvement with either party in the present suit and likewise had no interest in the outcome of this case.

[21] I must emphatically state here that Bank Negara Malaysia is a neutral party, with powers granted under the law to oversee banking operations in the country. I must stress here that I am placed in a similar position as Bank Negara Malaysia whilst being a regulator and now. I do not see any conflict in my role as a regulator and as a judge in the present suit. A regulator's role is to ensure that banks comply with rules, regulations and guidelines in order that the financial system of the country remain stable, resilient and command the nation's economic confidence. The complaint by TSKI written to the Governor of Bank Negara Malaysia in AKI5 would achieve a similar objective and bears testimony to the neutrality of Bank Negara Malaysia in the matter. Otherwise, TSKI himself would not have lodged a complaint against the defendant vide a letter sent to the Governor of Bank Negara Malaysia in AKI5.

[22] On the second issue brought up relating to my ground of judgment, it was a subject of appeal and would have been deliberated by the Court of Appeal at length. If I have to explain here, my observation is based on common sense that I believe any judge would have made in the course of hearing a case. I said TSKI is an astute businessman because he is and it is of general knowledge. If that is not the case, he would not have been able and willing to undertake a commitment involving a facility of such amount from any bank. I did make similar observation of another astute businessman in the case of *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi Mohd Salleh* [2009] 6 CLJ 371. I am sure if one were to run the pages in the law reports, such observations are often made. In the same light it is public knowledge that CIMB bank is a licensed institution both under Bank Negara Malaysia and the Securities Commission and plain common sense led to the presumption that I observed in that decision. I do not believe a judge should be disallowed from making a general and common sense observation in deciding a case. After all, the law is about what makes sense. I had drawn an analogy of TSKI's act of questioning the

Shariah compliant of the agreement he entered, to a Muslim who had food in a restaurant, only to question whether it was *halal* and disputing payment afterwards. I belief a judge is not denied of making a simple analogy to drive a point he is making for an understanding of some complicated legal principle. It is also the judge's role to demystify the law so that the public would be able to understand the judge's reasoning for coming to a decision. This, like impartiality, is an important element in maintaining confidence in our system of justice. I therefore am not able to appreciate Encik Malik Imtiaz's arguments that these observations can reflect my employment or information obtained at the Bank Negara Malaysia on this case. In any event such ground had been canvassed at the court of appeal though I do not have the privilege of knowing what arguments have been advanced on the same. As submitted by Encik Tommy Thomas that there was no request made for another judge to hear this case after the O 14 application was reversed by the Court of Appeal. So why now, after hearing had proceeded with two plaintiff's witnesses testifying?

[23] Similarly, the documents or letters cited by the plaintiff denoting the communications with Bank Negara Malaysia are also not something that the plaintiff could have just discovered. They are all in the trial bundles and were available to the plaintiff before the trial commenced. Encik Malik Imtiaz attempted to explain the reason being the voluminous documents in trial bundles had caused these letters to escape their attention. There are three counsel of the plaintiff conducting the trial of this case. In the chronology prepared by Encik Tommy Thomas, after a number of case managements, the 18 volumes of trial bundles were finally served on TSKI on 30 April 2010. The trial date of 4 May 2010 was vacated due to TSKF's application to disqualify Encik Tommy Thomas in encl 22. Another trial date of 11 May 2010 was vacated because Encik Thomas Mathew was hospitalised. Trial commenced on 17 May 2010 and PW1 and PW2 testified for a total of five days. There were more than ample opportunities for the three counsel to be aware of these communications and not to mention the ground of judgment. The explanation given on the timing of this application is rather precarious considering all the above.

[24] It is an acceptable proposition to say that a judge's impartiality is presumed. The strong presumption of judicial impartiality is dealt with by the Court of Appeal in *Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 5 MLJ 206; [2008] 3 CLJ 653. In view of that presumption, a reasonable standard of apprehension based on serious ground is necessary to be established to rebut it. Grandpri J in *Committee for Justice and Liberty v Canada (National Energy Board)* [1978] 1 SCR 369 said 'this apprehension of bias must be a reasonable one, held by reasonable and right minded persons'. A complaint of this nature is a serious one and must be made on substantial ground and the appearance of bias must be based on solid evidence. Decided cases show that judges are disqualified automatically where circumstances give rise to automatic disqualification as in *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL) because the judge was held to be interested in the outcome of the case though non-pecuniary in nature. A real danger of bias may arise in case of personal friendship or animosity with the judge or a judge is personally acquainted with any person involved in the case. The evidence established here is that I was acquainted with what was to be the Labuan suit. In fact it was an unsealed copy of the writ of summons and statement of claim of a discontinued Labuan suit. I have no other involvement in the case and neither have I any interest in its outcome. In my view it would be a dereliction of my duty, if I were to recuse on such flimsy ground.

[25] In deliberating and considering this application, I must continue to remain true to my constitutional duty and oath of office to uphold the law and the constitution. Just as it is improper for a judge to hear a case when there may

be a real danger for bias, it is also equally wrong for a judge to abdicate from his duty by disqualifying himself with no real basis. If a judge has to recuse himself for no real basis then it will lead to litigants shopping for judges of their choices. A judge may also recuse himself for no reason of rhyme, and abdicate from his duty in that process. This is the other side of the equation to Lord Hewart CJ's aphorism that 'it is not merely of some importance but is fundamental importance that justice should not only be done but should manifestly be seen to be done' in *The King v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256. In the same way, both situations will lead to a judicial chaos and justice will not be achieved. It will not only erode judicial efficacy and the quintessence of justice, but will stultify the objective and purpose of a recusal application.

[26] Finally, I am thankful to learned counsel for the plaintiff for drawing my attention to cll 5 and 8 of the Judges' Code of Ethics. Under cl 5, it is provided that a judge shall exercise his function independently and based on his assessment and understanding of the law, free from extraneous influence from any quarter or for any reason. Under cl 8, a judge shall ensure that extra-judicial activities do not cast doubt on him to act impartially or interfere with proper performance of his judicial duties. Having appraised myself again with above clause and reading the whole code in its proper context, I am more than convinced that I act and had acted throughout my time on this bench in accordance with these provisions. That said however, I am unable to appreciate the relevance of the code of ethics to this application.

[27] Having considered all the above reasons I hereby dismiss the application of the plaintiff in encl 45 with no order to costs.

Plaintiff's application dismissed with no order as to costs.

Reported by Kohila Nesan